Supreme Court, U.S.
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No. 99-56

In The

Supreme Court of the United States

JIMMY D. GILES,

Petitioner,

v.

SONS OF CONFEDERATE VETERANS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

JIMMY D. GILES
Pro Se
2000 Nathan Bedford
Forrest Complex
Jackson, MS 39208-9421
(601) 933-2000

LIST OF PARTIES

The parties to the present Petition appear on the cover. The additional parties mentioned in Respondent's Brief (i.e., Southern Defense Initiative Corporation, Southern Initiative, Inc. and Confederate Initiative, Inc.) no longer exist. Their participation in the proceedings in the Courts below is fully set forth in the statement of the case appearing on the second page of the Petition for a writ of certiorari.

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STATEMENT OF THE CASE

Respondent states that "The above recited facts are thus conclusive." (Respondent's Brief, Footnote one, p. 1). But Respondent's statement of the case recites some information which is neither true nor rendered conclusive by a finding of the District Court or the Jury. These include (1) that there is no specific message contained in Petitioner's logo (2) that this message did not constitute political speech worthy of protection under the First Amendment (contrast this with *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963) "constitutional protection does not turn on truth, popularity or social utility of the ideas and beliefs that are offered.") (3) in reality SDI's actions were nothing short of harassment of a competing organization (4) the lower court trebled the amount of profits to $3.00 (the Jury found profits of $1.00 but the Judgment of August 7, 1998 states "the damages should be trebled from $1.00 to $3.00." (See Petition, Appendix B, pp. 15-16).

Continuing the misstatements in Respondent's statement of the case (5) the hexagons in the mark and logo are not similar to the outlines of the individual arms of the cross superimposed on the square flag. The following quotation of one of the meanings of "similar" from page 1691 of *Webster's Deluxe Unabridged Dictionary*, Second Edition, is offered to refute this statement:

> *similar rectilinear figures*; in geometry, such figures as have their several angles equal each to each, and the sides about the equal angles proportional. Such figures are to one another as the squares of their homologous sides.

(6) Giles made his living off an unknowing public (the state of knowledge of the public was nowhere in evidence or any finding by the Jury or the courts below) (7) the altered logo (Respondent's Brief, Appendix A) conveys the identical political message. The new logo, adopted as a result of a preliminary injunction banning the original logo, fails to convey the sense of identification of its user with the Confederate Battle Flag and emotions connected therewith because the method of expressing this idea by enclosing the organization name in

hexagons reminiscent of the flag itself, thus figuratively wrapping the organization in the flag and wrapping the flag in the organization name to derive credibility from its status in Southern history and politics has been banned by the injunctions. Justice Stevens wrote in *U.S. v. Eichman*, 496 U.S. 310, "The freedom of expression protected by the First Amendment embraces not only the freedom to communicate particular ideas, but also the right to communicate them effectively." and (8) the new logo is proof that no infringement has occurred. To the contrary, the new logo proves Petitioner has been denied the right to choose the method of expressing his political ideas which he considers most appropriate and effective (See dissent of Justice Stevens in *U.S. v. Eichman*, supra).

Respondent notes infringement began in March 1997 but fails to include the fact this occurred on the Internet. All the conduct complained of involved Defendant's Internet web site. Judge Dalzell of the three-judge District Court which enjoined enforcement of key provisions of the Communications Decency Act wrote " . . . the Internet as the most participatory form of mass speech yet developed is entitled to the highest protection from government intrusion". (See *Reno, Attorney General Of The United States, et al. v. American Civil Liberties Union et al.*, 96-511 (1997), affirmed by the Supreme Court June 26, 1997).

Finally Respondent challenges the standing of Petitioner to seek review. Respondent amended its complaint to name Petitioner personally as a Defendant, charging that as the sole director and stock holder he was the alter ego of the Defendant corporation. Accordingly, he is named individually in the Judgment of August 7, 1998 and is specifically named therein as subject to the injunction. (See Petition, Appendix B, p. 15). He is specifically named as Defendant-Appellant in the Order of the Fifth Circuit Court of Appeals affirming the Judgment. (See Petition, Appendix A, p. 13).

REASONS FOR GRANTING THE PETITION

Respondent's Brief states on page 3 that the lower court properly engaged in a balancing of interests. Indeed there is no

mention of balancing in either the Lanham Act or the Opinion and Order of the District Court April 17, 1998. (See Petition, Appendix F, pp. 23-32). Defendant's constitutional rights were not considered a factor. The District Court stated flatly "Defendant does not have a First Amendment right to express his political views when his doing so violates the Lanham Act". (See Petition, Appendix F, p. 31). This necessarily implies that Defendant's constitutional rights are subject to congressional legislation and may be denied without regard to any mitigating circumstances.

ARGUMENT

A. Likelihood of Confusion versus Freedom of Speech – Or Congress versus the Constitution

The complete incompatibility between the uninhibited, robust and wide open debate on public issues called for by Justice Brennan in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and the restrictive Lanham Act is illustrated by the following contrasting statements from the Opinion and Order of the District Court of April 17, 1998 (See Petition, Appendix F, pp. 23-32) and the indicated Supreme Court decisions:

> The District Court said: "Even if technically true a representation that may tend to create a false impression is a violation of the act. (See Petition, Appendix F, p. 29). But Justice Brennan wrote in *N.A.A.C.P. v. Button*, supra, constitutional protection does not turn on the truth * * * of the ideas or the beliefs offered".
>
> The District Court said "Plaintiff does not have to allege that the Defendant has made a literally false allegation." (See Petition, Appendix F, p. 29). But the Supreme Court said in *N.A.A.C.P. v. Button*, supra, "erroneous statement is inevitable in free debate and it must be protected if freedoms of expression are to have the breathing room they need to survive."
>
> The District Court said "a reference which, while not literally false, is misleading or likely to confuse, may form the basis of a claim under Section 43 (a) of the

> Lanham Act. (See Petition, Appendix F, p. 29). But, referring to exaggeration, vilification and *even false statement*, the Court said in *Cantwell et al. v. Connecticut*, 310 U.S. 296 (1940), "The people of this country have ordained in the light of history * * * that these liberties are in the long view essential to enlightened opinion and right conduct on the part of the citizens of a democracy".

Clearly, if the freedom of political debate from government control promised by the First Amendment is to be a reality and not just rhetoric the Lanham Act which is appropriate for commercial activity which is really commercial can have no place in the discussion and dissemination of political ideas.

Respondent says political speech is entitled to First Amendment protection but not without limits. The limits approved by the Supreme Court so far are the lewd, the obscene the libelous and the insulting, or fighting words. The exceptions do not include such expressions as those "which may tend to create a false impression" which are sufficient to trigger an action under the Lanham Act. While property rights are an important interest, they in no way approach the value and importance of freedom of speech and the press under our constitutional system. Respondent's proposal would compare apples and oranges.

B. Decisions Below Do Conflict With Case Law Because They Deny Petitioner the Right to Choose the Method of Expressing His Political Ideas Without a Compelling National Interest to Justify the Restriction.

In this case there is no alternative method of equal effectiveness. Justice Stevens wrote in *U.S. v. Eichman*, supra, "The freedom of expression protected by the First Amendment embraces not only the freedom to communicate particular ideas but also the right to communicate them effectively."

The enjoined logo employed the device of figuratively wrapping Petitioner's organization in the flag thereby deriving credibility from and identification with the flag by enclosing

the organization name in hexagons reminiscent of the flag itself. In *U.S. v. Eichman*, supra, it was held that the choice of method of expressing political ideas by each speaker is protected by the First Amendment in a case such as this where the competing interest is less significant than protection of the national flag from desecration. In this case the only purpose for denial would be "to promote the interest of the Sons of Confederate Veterans" as shown by the certificate of registration attached to the Complaint. The Sons of Confederate Veterans makes no civic contribution such as participating in political debate as the Petitioner does. It is tax exempt and non-political, with membership restricted to males who can prove descent from a Confederate veteran. Thus it is elitist, excluding all women, all men who don't know or don't care whether their ancestors fought in the Civil War or on which side, descendants of immigrants who arrived since 1865 and almost all African Americans since there were so few black Confederate soldiers. To speak of restricting the choice of method of expressing political ideas to promote the interest of such an entity is grotesque.

C. Narrow Interpretation of the Lanham Act Would Exclude Application to Political Advocacy.

Respondent, a recent convert to narrow interpretation of the Lanham Act after two years of touting *United We Stand America, Inc., a D.C. Corporation v. United We Stand, America New York, Inc., a New York Corporation*, 128 F.3d 86 (2nd Cir. 1997), now goes half way and would exclude application of the act but only to cases where a political organization can find no other way to deliver its message and cites Circuit Court cases dealing with the film industry and the marketing of sportswear to support this theory. But Respondent cites no case involving political protest. Justice Stevens wrote in *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992) that when the government regulates political speech First Amendment protection is at its zenith. Johnson of *Texas v. Johnson*, 491 U.S. 397, could have written to his Congressman, but the Supreme Court overturned a Texas statute to vindicate his right to burn a national

flag instead. Eichman of *U.S. v. Eichman*, supra, could have written a letter to the editor but in that case an act of Congress was struck down to vindicate Eichman's right to choose burning the national flag as his preferred method of political expression. The issue debated among the Justices in that case was precisely defined by Justice Stevens who dissented from the holding as whether the interest of allowing each speaker to choose the method of expressing his or her political ideas which he or she considers to be the most appropriate and effective outweighs the interest of society in preserving the symbol of our national sovereignty. In this case the problem for the Justices if they chose to hold property rights commensurate with free speech would be whether the promotion of the interest of a private organization outweighs an interest which has already been held superior to preservation of the symbol of our national unity and sovereignty.

Additionally, Respondent claims the District Court Judgment allowed Petitioner to continue to convey his message. But what is at issue here is impairment of the effectiveness of the message and identification of the objective of states' rights with an activist organization dedicated to making these rights a reality, due to the enjoining of the device of enclosing the name of the Petitioner's organization in hexagons reminiscent of the cross superimposed on the square flag and surrounding the flag with these hexagons. The purpose of this was to enhance the sense of identification of the organization and its message with the powerful symbol which is the Confederate Battle Flag.

D. The Record Shows Reversible Error by the Courts Below.

Respondent's statements that Petitioner did not file post-trial motions, did not order a transcript and did not preserve any factual issues for review are irrelevant. The Opinion and Order of the District Court of April 17, 1998, states "Southern is a political organization which adopts a platform and endorses candidates." (See Petition, Appendix F, p. 29). And "Southern maintains a web page on the Internet and uses its

web page for political advocacy." (See Petition, Appendix F, p. 24). Further the Opinion and Order states "Defendant cites the First Amendment as authority for his right to uninhibited expression of his political views." (See Petition, Appendix F, p. 31). And "Defendant argues the power of Congress does not extend to regulation of political speech * * * or the allocation of certain modes of expression to holders of recognized marks". (See Petition, Appendix F, p. 31). The Opinion and Order also contains the substance of the Complaint, the contentions of Respondent and the disposition of the controversy by the District Court. There is no dispute as to the facts stated in the Opinion and Order and review is sought on the basis that Petitioner had a right to dismissal as a matter of law.

The Opinion and Order of the District Court (1) relies on *United We Stand America*, supra, which Respondent now repudiates in favor of their version of a narrow interpretation, which amounts to nothing but the discredited alternative avenue approach (See Petition, Appendix F, pp. 28-29) (2) the Opinion and Order states flatly that "Defendant does not have a First Amendment right to express his political views when his doing so violates the Lanham Act." (See Petition, Appendix F, p. 31). This necessarily implies that a constitutional right which would otherwise exist has vanished into thin air with the passage of an act of Congress and (3) the Opinion and Order justifies its holding by quoting "property rights need not yield to First Amendment rights where adequate alternate avenues of communication exist." (See Petition, Appendix F, p. 31). Since *U.S. v. Eichman*, supra, it has been the law of the land that the choice of a method of expression of political views belongs to each speaker absent a compelling national interest justifying denial of a First Amendment right. In *Texas v. Johnson*, supra, the dissenters wrote "the Texas statute deprived Johnson of only one rather inarticulate form of symbolic protest * * * and left him with a full panoply of other symbols and every conceivable form of verbal expression". But Johnson was upheld in his choice of the method of expression he deemed most effective.

As was contended in the District Court and in Petitioner's appeal to the Circuit Court of Appeals, the alternate method

reasoning is flawed and constitutes reversible error. Petitioner was entitled to dismissal as a matter of law. The question of "confusingly similar" was irrelevant and all proceedings subsequent to submission of Defendant's pre-trial motions were unlawful and a violation of Petitioner's right to due process of law.

Respondent provides Appendix A to its Brief to illustrate an alternative method of communication which Petitioner has adopted to replace the logo which was enjoined. It is stated that the current logo conveys the exact same message because it is the flag that conveys the political message. But the message is more than the flag. It is "come join us in restoring states' rights". It includes identification of an activist organization with a cherished objective. Without advocacy, agitation and active promotion through organization, the message of states' rights is inert, sterile and ineffective. As previously explained identification of the objective with a proposed means of accomplishing it was accomplished prior to the injunction by symbolically wrapping the organization in the flag by enclosing the organization's name in hexagons reminiscent of the cross which dominates the flag and enclosing the flag on all sides with these hexagons. (See Petition, Appendix H, p. 40). Of course under *U.S. v. Eichman*, supra, the choice belongs to each speaker, and Petitioner chooses to restore this particular arrow to his quiver.

Respondent seeks to back away from its argument in the District Court that if the dominant portions of two marks are the same confusion is likely. But it is obvious that the dominant portion of the logo in Appendix A to Respondent's Brief is the Confederate Battle Flag, just as in the logo which was banned (See Petition, Appendix H, p. 40). The Court has not given its approval to the logo illustrated in Appendix A to Respondent's Brief. The Court has simply banned use of any symbol found to be confusingly similar to the SCV mark; we can't tell you what is "confusingly similar", only the Jury can do that after the fact. The Court has put a fence around the Confederate Battle Flag and threatened anyone except the SCV with jail time if the line is crossed. Respondent could change its mind as soon as this Petition is denied, just as they have

changed their "dominant portions" argument and begin a suit to enforce the injunction. Expression by all but the hardiest is chilled by this situation. Meanwhile Respondent argues illogically and absurdly that their service mark has two dominant portions, the flag itself and the hexagons surrounding it. (See Brief, p. 10). By definition there can be only one dominant portion and if the portions are of equal status then the mark lacks a dominant portion. No one could seriously contend that the Confederate Battle Flag, known world-wide, revered and despised alike by millions, is the predominant part of any mark or logo in which it appears.

E. Pretrial Motions Were Erroneously Denied.

It is obvious that the District Court had jurisdiction to do one thing and that was to dismiss the Complaint. A Congress which is forbidden to abridge freedom of speech obviously lacks power to confer on a District Court authority to penalize the exercise of that right. The "confusingly similar" question was at all times irrelevant in view of Supreme Court holdings that the choice of method of expression belongs to each speaker in the political arena. The District Court did not analyze anything under the balancing test. It simply said if the Jury finds for "confusingly similar" we will do you in, and it did.

F. Rebutting the Rebuttal.

Respondent asserts there is no legal authority for our position that the First Amendment precludes government regulation of political debate. We believe the authorities previously cited herein tend to erect a wall of separation between government and political debate similar to the celebrated wall of separation between church and state. Debate should be uninhibited, robust and wide open and there must be breathing room so that First Amendment rights can survive. Erroneous statement is inevitable in the heat of rhetorical conflict and politicians cannot be held to the standard of truth unless they libel someone. The "consumers" of political rhetoric as they

have been characterized by Respondent throughout these proceedings should heed the aphorism "Let the buyer beware".

We disagree with Respondent's statement that the flag burning cases add nothing to our case. If the words of the Court mean what the dictionary says they mean, these cases dispose of the alternative avenue excuse for restricting the freedom of speech short of some compelling national interest to justify the restriction. Under these cases methods of expression are protected, as well as speech whose content may be unpopular, untrue, or lacking in social utility, or otherwise objectionable to some, to many, or to all but the speaker.

Also, Justice Stevens criticized the alternative avenue approach in *Reno, Attorney General Of The United States, et al. v. American Civil Liberties Union, et al.*, supra, saying "The government's position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books".

CONCLUSION

The Petition for Writ of Certiorari should be granted because the Lanham Act as applied to Petitioner abridges his freedom of speech by denying him a method of communication which identifies his organization with the symbolic meaning of the Confederate Battle Flag by enclosing his organization's name in hexagons reminiscent of the flag itself and this abridgment of his freedom is not justified by any compelling national interest. Additionally, the busy and important Court of Appeals for the Second Circuit is apparently still committed to a broad interpretation of the Lanham Act which Respondent now repudiates. For this reason it is important that the Supreme Court now review the matter.

Respectfully submitted,

JIMMY D. GILES
Pro Se
2000 Nathan Bedford Forrest Complex
Jackson, MS 39208-9421
(601) 933-2000